No. 1 5 4 4 6 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

A. J. BLACKMAN
315 West Ninth Street
Los Angeles 15, California

Attorney for Appellant.

No. 1 5 4 4 6 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

A. J. BLACKMAN
315 West Ninth Street
Los Angeles 15, California

Attorney for Appellant.

TOPICAL INDEX

TABLE OF AUTHORITIES

No. 15446 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, et al,

Respondents.

PETITION FOR REHEARING

Appellants respectfully petition the Court for a rehearing upon the following grounds:

ARGUMENT

This is the very exceptional case wherein a lawyer's inclination to advise as to the futility of a petition for rehearing is overcome by his conviction that a fundamentally wrong decision has been rendered.

It is not merely the interest of the litigants that makes it important to obtain a correction of the decision. If allowed to stand, it will have a demoralizing effect upon the future of

all aviation liability cases brought under federal law in this circuit.

GROUND I.

THE COURT DECIDED AN IMPORTANT QUESTION OF LAW IN A WAY WHICH CONFLICTS WITH ESTABLISHED LAW.

A. Scope and Basis of Decision.

It will be recalled that this was a suit for the wrongful death of three passengers for hire lost in the crash of a DC-6 aircraft July 12, 1953. The plane was operated by Respondent Transocean Air Lines, Inc. (Transocean) on a flight from Guam to Oakland, and crashed about one hour and forty minutes after takeoff from Wake Island and approximately 340 miles east of that point. 1/ Only bits of wreckage and fourteen bodies were recovered from the ocean.

In the pre-trial Order herein, respondents stipulated that they "are not aware of any facts which reasonably could have caused this accident, and intend to offer no evidence tending to show such cause." (V. 1, Record (hereafter, R.) 36-37). The Order made on this stipulation was never modified, and to our knowledge respondents have never offered any

---

1/ Inadvertently, this Court stated the time and place of crash as 15 minutes after takeoff and 100 miles east of Wake Island (Opinion, p. 3).

evidence tending to explain the cause of the crash.

Upon these facts, we contended that we were entitled to judgment by application of the doctrine of res ipsa loquitur. We contended that the doctrine, as it applied to common carrier cases, cast upon the carrier the burden of explaining the cause of the accident or of exercising care in all possible respects (Op. Br. 25-29).

Transocean contended that the federal rule of res ipsa was a "watered down" version under which "it cannot be charged with the burden of explaining the cause of the accident or catastrophe" (its Brief, p. 17). It cited Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815; Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 67 S. Ct., 401, 91 L. Ed. 416; and Johnson v. United States, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 as supportive of this view.

In its decision, this court accepted these cases as controlling authorities here, stating that:

> "In this case appellant strongly urges (though not exclusively) that the applicability of the doctrine of res ipsa loquitur would cure all the defects seen by the trial court in his case. We cannot agree, for under the doctrine of res ipsa loquitur, as expounded by the Supreme Court of the United States, and applicable in admiralty proceedings, while the doctrine of

res ipsa loquitur permits a verdict for one in appellant's position, its application does not require it."

We submit that such decision under the facts of this case is incorrect in that none of the foregoing authorities are passenger-carrier cases. The effect of res ipsa in the cited cases is different from the effect of the rule in our case.

B. The True Authorities Are Carrier Cases Which Ever Since Stokes v. Saltonstall 2/ Apply The Rule For Which Appellant Contends.

We did not cite in our Reply Brief Stokes v. Saltonstall and the cases which follow. When Transocean answered our Opening Brief we did not realize that the Supreme Court recognized a different procedural effect of res ipsa in carrier cases than in non-carrier cases, and that since Transocean had cited only non-carrier cases to the Court these authorities did not govern here. We believe that the following will demonstrate that the California carrier cases we cited in our Opening Brief (pp. 26-28) actually stem from law pronounced by the United States Supreme Court in like cases.

In Stokes v. Saltonstall, a passenger sued a stage-coach carrier to recover for an injury sustained when the coach upset. The trial court instructed the jury that: " . . . the facts that

2/ 13 Pet. (U. S.) 181, 10 L. Ed. 115, 7 Am. Neg. Cas. 297.

the carriage was upset, and the plaintiff's wife injured, are prima facie evidence that there was carelessness, or negligence, or want of skill on the part of the driver; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault"; and also, that it was incumbent on the defendant to prove that the driver was a person of competent skill and good habits, and that he acted on the occasion in question "with reasonable skill, and with the utmost prudence and caution". Judgment for plaintiff was affirmed, the Court stating (193):

> "It is objected, however, in the printed argument which has been laid before us, that although the facts of the overturning of the coach, and the injury sustained, are prima facie evidence of negligence, they did not throw upon the defendant the burden of proving that such overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business; that the coach was properly made, the horses steady, etc. Now, taking that portion of the first and second instructions which relates to the burden of proof together, we understand them as substantially amounting to what the objection itself seems to concede to be a proper ruling,

and what we consider to be the law. For although, in the first, it is said, that these facts threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault; yet, in the second, it is declared, that it was incumbent on the defendant, in order to meet the plaintiff's prima facie case, to prove that the driver was a person of competent skill, of good habits, and in every request qualified, and suitably prepared, for the business in which he was engaged; and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution."

In Gleeson v. Virginia Midland R. R. Co., 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859, the court says (p. 443):

"Since the decisions in Stokes v. Saltonstall, 13 Pet. 181, and Railroad Company v. Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that, (the passenger being himself in the exercise of due care,) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight.

The rule announced in those cases has received general acceptance; and was followed at the present term in Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551."

Likewise, in Penn. Co. v. Roy, 102 U. S. 451, 455-6, the Court says:

" . . . In Stokes v. Saltonstall (13 Pet. 181), affirming the decision of Mr. Chief Justice Taney on the circuit, we said, that although the carrier does not warrant the safety of the passengers, at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in Railroad Company v. Pollard (22 Wall. 341), where, speaking by the present Chief Justice, we said that we saw no necessity for reconsidering Stokes v. Saltonstall.

"These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful,

prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if the carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the

passenger, belong to others." (Or, if we may paraphrase, are maintained by others.)

That the federal rule of res ipsa in carrier cases is not merely a permissible inference was recognized in an annotation, " 'Res Ipsa loquitur' as a presumption or a mere permissible inference", 53 A. L. R. 1494, 1509, as follows:

> "Even in the United States Supreme Court (although this court is generally credited with having adopted the theory that the doctrine of 'res ipsa loquitur' is a mere permissible inference), the rule is that the happening of an injurious accident, in passenger cases, prima facie, is evidence of negligence on the part of the carrier, and, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that his whole duty was performed and that the injury was unavoidable by human foresight."

It may readily be seen, then, that the California cases cited (Op. Br. 26-28) by us to this Court do no more than expound the same rule as federal law, which in turn is no more or less than established common law in this respect.

Thus in Fairchild v. Calif. Stage Co., 13 Cal. 599, the court quotes from Story on Bailment (which authority likewise is quoted in Stokes v. Saltonstall) as follows (p. 605):

"In Sec. 605 a, the further proposition is stated, that 'when injury or damage happens to the passengers, by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption prima facie is, that it occurred by the negligence of the coachman; and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof.'"

Stokes v. Saltonstall is cited by the same California court earlier in its opinion.

And in Ficken v. Jones, 28 Cal. 618, 628, the court says:

" . . . If the passenger sustains injury without fault on his part, by the oversetting of a stage-coach, or from a railroad disaster, or the like, such accidents are, in the first place, attributed to the default of the proprietor, and

are prima facie evidence of negligence on his part. (Boyce v. California Stage Co., 25 Cal. 467; McKinney v. Niel, 1 McLean, 540; Stokes v. Saltonstall, 13 Pet. 181; Ware v. Gay, 11 Pick, 106; Ingalls v. Bills, 9 Met. 6; Carpue v. London and Brighton Railway Co., 5 Adol. & E. 747; Ang. on Com. Car., Chap. 11.) In such case it is well settled to be competent for and incumbent on the defendant to show that those in charge of and conducting the business were persons of good and careful habits and competent skill, and also whatever else is necessary to establish the fact of the utmost care and prudence on the defendants' part."

Nothing in Capital Transit Co. v. Jackson, CA-DC, 149 Fed. 2d 839 cited by the court, militates against the foregoing. The only question there was whether res ipsa applies in favor of a passenger against a carrier which injured him in a collision with a truck. The trial court directed a verdict for defendants, and the appellate court reversed, based upon authorities including cases from California. Its discussion of the nature of the doctrine was dictum and did not touch the question in bar. In stating "When all the evidence is in, the question" is still for the jury, Mr. Justice Groner did not define what evidence was required. This we submit has been defined by the Supreme

Court decisions quoted above.

Nor is the inference of negligence for which we contend in the instant case dispelled by the presumption of due care of the deceased pilots. This very point was discussed in The Nitro-Glycerine Case, (Parrot v. Wells, Fargo & Co., 82 U. S. 524, 21 L. Ed. 206) where the court states (p. 537-538):

> " . . . A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.
>
> "The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it."

Also, the inference blankets every species of act or

omission which could have caused the crash, not only the conduct of the pilots (Nysted v. Wings, Ltd., 51 Man. Rep. 63, (1942) 3 D. L. R. 336).

C. Transocean's Showing Was Insufficient As A Matter of Law.

At the risk of belaboring the fact, we repeat that in our case Transocean did not as a matter of law offer evidence sufficient to meet the requirements of the rule. Not only did Transocean stipulate that it was not aware of any facts which reasonably could have caused the accident, and intended to offer no evidence tending to show such cause (Pre-Trial Order, R. 36-7), it offered none in fact. It did offer evidence tending to rebut, in some respects only, our evidence of specific acts of negligence (our Reply Brief, pp. 6-8).[3/]

But most important, Transocean did not and could not offer evidence tending to explain the cause of the accident, nor establish due care in all possible respects which could have caused it. Transocean admitted that it did not know the cause (R. 859). Likewise, it did not know and could offer no evidence that it "acted on the occasion with reasonable skill, and with utmost prudence and caution" (to quote from Stokes v. Saltonstall). There was no evidence of how its pilots acted at and immediately prior to the time of crash. This lack we believe

3/ Although the Court's opinion (p. 2) states: "Defendants offered evidence to show what they knew of the aircraft's maintenance and operation", none of the evidence referred to pertained to the aircraft's operation at and immediately prior to time of crash.

is fatal to the judgment in its favor. It was just such a lack which led Judge Folta, and this court in affirming, to give judgment for plaintiff in Des Marias v. Beckman, 198 Fed. 2d 550

Under these circumstances, we believe that Des Marias v. Beckman, 198 Fed. 2d 550 (CA-9) cited and quoted in extenso by this Court is the closest court of appeals authority for the instant case. There it may be recalled that the plane disappeared without a trace, and the action was for death of a passenger brought against the air carrier under Death On High Seas Act. Defendant offered no explanation of the loss. This Court approved the trial court's opinion which concluded with "I am of the opinion that the doctrine of res ipsa loquitur is applicable... Judgment may accordingly be entered for the plaintiffs." No hint appears there that the Court merely drew a permissible inference. Its conclusion appears as the logical result of pure syllogistic reasoning.

That this Court reached a like result was noted (our Reply Brief, p. 5) in Bergen v. U. S. (CA-9) 222 Fed. 2d 949 (1955). There Plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, reversed. The Court states (p. 950):

> "The cause of the wreck we do not know.
> * * * However, we believe that this was clearly
> a case of an instrumentality and events solely within

the control of the defendant and a case for the application of res ipsa loquitur. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden." (Italics added.)

This case was not cited by this Court and has not been distinguished by it. The Bergen case would appear to state the rule of res ipsa applicable in carrier-passenger cases under federal law, and in accordance with the authorities cited above. We submit that the same rule, and result, should apply in the instant case.

GROUND II.

THE COURT'S HOLDING THAT APPELLANT WAS NOT PREJUDICED EVEN IF THE TRIAL COURT FAILED TO APPLY RES IPSA LOQUITUR SANCTIONS DENIAL TO APPELLANT OF THE MOST VITAL PART OF HIS CASE.

---

89 C. J. S. 351 states:

"When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law and he is also the tribunal compelled to determine what the facts are."

In our briefs we pointed to a ruling by the trial court

which denied applicability of res ipsa. That court referred to it three separate times as a "ruling". This Court stated (Opinion, p. 4) that:

> " . . . whether or not the court applied the doctrine is not controlling on this appeal. This because, were it applied, the trial court was yet required to weigh all the evidence produced. This the court did and made findings adverse to appellants."

But there could be no finding based upon evidence exonerating Transocean in respect to the manner of its operation of the aircraft after its take-off from Wake Island and immediately before the crash, for no evidence was introduced thereon. This record is silent as to what caused the emergency, or how the pilots acted during and immediately before those last awful minutes.

Yet in reasoning as above, this Court denies Appellant's passengers the benefit of even a permissible inference from res ipsa. For with the trial court's refusal to apply the doctrine (as we believe we have shown), nothing else could supply (1) an inference of negligent conduct by the carrier on the occasion in question, and (2) an inference of proximate cause. Thus, in the final court's view, the scales remained evenly balanced, and we failed to carry our burden of proof. It was to fill just such a gap that the doctrine of res ipsa loquitur

was intended. As approved by this Court (Opinion, p. 6-7) in Des Marias v. Beckman, 198 Fed. 2d 550:

> " . . . the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e., defendant's negligence, which must have existed in the casual chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the casual chain, cannot know and cannot prove to have actually existed."

If the function of res ipsa is to supply a fact vital to recovery and which plaintiff cannot otherwise prove existed, the refusal of the trial court to apply the doctrine can hardly be held to be "not controlling" before this Court. In effect, our case never got off the ground without it.

To say (Opinion, p. 4) that with or without res ipsa we do not show a clear preponderance of evidence in this court wholly fails, we submit, to give us the benefit of the rule in the trial court where all we are required to show is a mere preponderance of evidence. Especially is this true where as here the evidence is all circumstantial to the cause of crash.

As to the trial court's refusal to apply the doctrine, we believe the record speaks for itself on this.[4/] Plaintiff

---

4/ As set forth at length in the Appendix.

requested a ruling on whether or not res ipsa applied. The Court made a ruling, referred to it as a ruling, and all opposing counsel acquiesced in it as a ruling. The Court concluded his statements upon the subject with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling." (Italics added.) When appellant's counsel asked whether the subject was "still open for consideration at a later date", the trial judge did say yes, undoubtedly as a concession. At best, this can be construed as no more than saying his ruling was "without prejudice". However, it would have taken a new and different ruling to eliminate the effect of the first one. This record is barren of such.

In our reply brief (p. 4) we cited San Diego Gas & Elec. Co. v. U. S. ,(CA-9) 173 Fed. 2d 92, 94 (we erroneously cited 174 Fed. 2d 92) where this court stated:

> "' . . . This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is" . . . the record shows no basis for liability." This ruling, as would be a formal finding to the same effect, is clearly erroneous.'"

We believe that a fair appraisal of the language used by the trial court in the instant case leads inevitably to the same

conclusion.

GROUND III.

THE "CLEARLY ERRONEOUS" RULE (F. R. C. P. 52(a)) DOES NOT APPLY WHERE THE TRIAL COURT COMMITTED AN ERROR OF LAW WHICH MANIFESTLY INFLUENCED OR CONTROLLED HIS FINDINGS.

In Owen v. Com'l Union Fire Ins. Co. of N. Y., 211 Fed. 2d 488 (CA-4, 1954) the Court states (p. 489):

> ". . . The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact, such as a mistake as to the burden of proof. 3 Am. Jur. p. 472; Hall v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972."

We submit that the trial court erred in the instant case in ruling that res ipsa did not apply, and that this error manifestly influenced and controlled its findings. It follows that the "clearly erroneous" rule of F. R. C. P. 52(a) should not bind this Court in its decision here.

GROUND IV.

THE TRIAL COURT SHOULD HAVE APPLIED RES IPSA AS AGAINST RESPONDENT SLICK AIRWAYS, INC. (SLICK).

This Court states (Opinion, p. 12-13) that:

"There seems little question but that on this record we could not hold as a matter of law that Slick had exclusive control over the plane so as to render res ipsa loquitur applicable. To consider holding Slick liable would at least require some proof that a failure to maintain the plane in proper mechanical condition was a proximate cause of the crash. This factual issue has been decided by the trial court adversely to appellant."

The factual determination by the trial court would not be binding where it ruled that res ipsa did not apply against Slick, if that ruling was erroneous. We believe it was, because the theory of retained control by a maintenance firm permits the doctrine to apply as against it. Our authorities to this effect were cited (Op. Br. 20-21), and not distinguished.

Additionally, Prosser on Torts (2 ed. 1955) states (p. 206):

"There are other cases in which it is clear

that 'control' is simply the wrong word. The plaintiff who is riding a horse is in exclusive control of it, but when the saddle slips off the inference is still that it is the fault of the defendant who put it on." (Citing Rafter v. Du Brock's Riding Acadamy, 75 Cal. App. 2d 621, 171 P. 2d 459).

Nor does res ipsa against Slick preclude res ipsa against Transocean, since a carrier's duty to maintain its equipment is historically held to be non-delegable and in the case of our carrier expressly imposed by law (Op. Br. pp. 15-16).

Also, the statement (Opinion, p. 13) that to consider holding Slick liable required some proof that maintenance failure "was a proximate cause of the crash" we earnestly believe to be wrong. All we are required to show is some proof of each of the elements which give rise to res ipsa. This we did by uncontradicted proof showing the carrier-passenger relationship, the crash, and that Slick did the maintenance on the aircraft under a contract to keep it airworthy. The doctrine is then before the trial court for its consideration. We need not inquire as to its procedural effect as against Slick. For if it is in the case at all, the trier of fact at least can draw a permissible inference from it of negligence and proximate cause. Here, he ruled it was not in the case. Again, without

res ipsa in the trial court our case never got off the ground.

CONCLUSION

There is neither novelty nor uncertainty in the authorities which govern the rights of a passenger as against his carrier - whether it be a stagecoach or an airplane. As against Transocean at least we feel firmly convinced that we were entitled to res ipsa and didn't get it in the trial court.

Surely, this is a case where a rehearing should be granted to keep consistency in the law and do justice among the parties.

Respectfully,

A. J. BLACKMAN

Attorney for Appellants.

CERTIFICATE OF COUNSEL

A. J. Blackman, counsel for the above named appellants and petitioners, certifies that in his judgment the petition for rehearing which accompanies this certificate is well-founded, and that it is not interposed for delay.

Dated this May , 1958.

A. J. BLACKMAN

APPENDIX

The proceedings at trial, ending with the Court's ruling that the doctrine of res ipsa did not apply, have been extracted from the Record, as follows:

(Friday, April 13, 1956)

"MR. BLACKMAN: . . . So I would respectfully ask the Court, if it would, to see whether or not it will give us an answer to those questions of law that are contained in the pre-trial order, at least, so that we know just how far our proof should extend at this time.

"THE COURT: Well, I just had in mind your proceeding at this time, Mr. Blackman - in other words, calling your witnesses. We will take care of that as we go along, and not make any decision on that right now.

"MR. BLACKMAN: I see.

"THE COURT: I will work on it some on the week end or sometime, but I have been trying this case and I thought maybe we could go ahead and I could work on it during the week end.

"MR. BLACKMAN: Fine, your Honor.

"MR. TILSON: I can assure your Honor that we have no idea of conceding that res ipsa applies in this particular case, which, of course, is on the admiralty side and brought under a specific statute which was not in any manner involved

in the cases cited. So that I think before we get through we will be going ahead with all of it anyway.

"THE COURT: We'll just proceed with the case.

"THE TILSON: Yes, just go ahead with the trial.

"THE COURT: Well, we'll do it that way. The Court has made its statement. Mr. Tilson spoke, and I take it Mr. Kearney and the rest of you go along with Mr. Tilson's statement on that?

"MR. KEARNEY: Yes, your Honor, although I think, as far as Douglas Aircraft Company is concerned, the plaintiff does not claim that the doctrine of res ipsa loquitur would in any event apply.

Isn't that true, Mr. Blackman?

"MR. BLACKMAN: I think that's a fair statement, yes.

"MR. FOXX: On behalf of defendant Slick, we certainly strenuously contend that it does not apply to the defendant Slick.

"THE COURT: All right. Well, you might as well proceed then."

* * * * * *

(Tuesday, April 17, 1956)

"MR. BLACKMAN: One other matter, if I may inquire of the Court whether or not the Court has come to any conclusion concerning this question of the applicability of res ipsa loquitur.

"THE COURT: Well, I felt that it didn't apply. Just

go ahead with your case.

"MR. BLACKMAN: I see. Is that an indication that the Court has on the basis of the evidence that has been submitted so far?

"THE COURT: Oh, no. I had to make a ruling the other day when you brought that question up.

"MR. BLACKMAN: Yes.

"THE COURT: I said that if I ruled on that it would shorten the case, and I said I felt it didn't apply. So we will proceed with the trial.

"MR. BLACKMAN: Is the question still open for further consideration at a later date?

"THE COURT: Yes, certainly.

"MR. BLACKMAN: I see.

"THE COURT: I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling.

"MR. TILSON: No, indeed.

"MR. WEST: No quarrel, your Honor.

"MR. FOXX: No quarrel.

"THE COURT: All right."